CHAIRMAN, SARAWAK HOUSING DEVELOPERS' ASSOCIATION

v.

MALAYAN BANKING BHD

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CIVIL SUIT NO: 22-30-2004-III(II)]
3 APRIL 2009

CIVIL PROCEDURE: *Locus standi - Action for conversion - Whether plaintiff lacked capacity or locus standi to institute action - Plaintiff is suing in a representative capacity - Issue of locus standi only raised in re-amended defence - Late stage which the court cannot condone*

TORT: *Conversion - Banker and customer - Cheques - Whether the defendant had committed tort of conversion by honouring the 186 cheques amounting to RM322,007.95 issued and signed by executive secretary - Whether plaintiff had proved executive secretary's authority to issue and sign cheques was invalid in that such authority had not been approved by the executive committee - Whether the second version of the minutes of the 3rd executive committee meeting was a fake document created by executive secretary*

BANKING: *Cheques - Forged cheques - Whether plaintiff had complied with terms and conditions imposed by defendant in the operation of cheque account - Whether plaintiff breached its duty of care in the use of the current account - Conclusive evidence clause - Whether Association had notice of the conclusive evidence clause*

The plaintiff is the Chairman of the Sarawak Housing Developers' Association (SHDA) for the period 2002 till 2004 and is suing the defendant with whom SHDA had opened a current account. The plaintiff claims RM322,007.95, being an amount wrongly honoured by the defendant through 186 cheques signed solely by one Nazerah Haji Obeng (Obeng). Obeng was appointed as the executive secretary of SHDA sometime in 2001 and was tasked with the daily administrative duties of SHDA's office. She was also tasked with the recording of the minutes of the executive committee meetings. The cheque book of the current account was also kept by her. An executive committee meeting was held on 11 April 2002 (3rd executive committee meeting). Two versions of the minutes of that meeting were produced during the trial. The plaintiff maintains that SHDA never authorized Obeng as one of the signatories for the

A current account. The second version of the executive committee meeting minutes and the letter dated 18 May 2002 allegedly signed by the plaintiff were forged documents done by Obeng and used to perpetrate her scheme to defraud the plaintiff. SHDA further contended that the defendant had breached its duty of care in
B failing to check with the officer bearers and the constitution of SHDA on the truth of the contents of 18 May 2002 letter. Because of this failure, it alleged that the defendant had committed the tort of conversion. The defendant maintains the plaintiff was solely to blame for the loss due to its failure to comply with the terms and
C conditions attached to the operation of the current account and as such is disentitled to claim for the refund of the aforesaid sum or alternatively SHDA had contributed to the loss by their own negligence.

Held (allowing the plaintiff's claim):

D

(1) The defendant knew from the start that it was SHDA who is seeking recovery of the sum RM322,007.95. Furthermore the defendant had filed unconditional appearance, defence, amended defence and re-amended defence. The defendant should have
E applied to strike out the action soon after appearance. To leave it to such a late stage is nothing but a ploy of cloak and dagger advocacy which cannot be condoned by the court. Accordingly the defendant's contention of the plaintiff's lack of capacity to sue is dismissed. (paras 23, 24 & 25)

F **(2)** The inclusion of cl. 9.3, a conclusive evidence clause amounts to an attempt to introduce an exemption clause which would exclude liability for a fundamental breach. The exclusion clause cannot be relied on by the defendant here. Thus the conclusive clause and the other conditions connected to it have no legal
G effect on the plaintiff. The defendant is saying to the plaintiff that it is not liable as the conclusive evidence clause excludes its fundamental obligation of debiting the account only when the mandate is validly given. The defendant's failure to advise the plaintiff accordingly militates against the defendant as far as
H the notice issue is concerned. The defendant ought to have at least advised the Board of SHDA to seek legal advice on the terms and conditions attached to the opening of the cheque account or alternatively inform the defendant the legal effect of the conclusive evidence clause and the other related clauses

I

especially the effect of failing to challenge the monthly statements. Accordingly the defendant is prevented from relying on the conclusive evidence clause. (paras 35, 36, 37, 38, 39, 40 & 41)

(3) In any event, the defendant is prohibited from relying on the conclusive evidence clause as they had been negligent in accepting the signature of Obeng as an authorized signatory. The plaintiff had on a balance of probability proved that Obeng had forged the second version of the minutes of the 3rd executive committee meeting (forged minutes). The defendant at that point in time had a duty of care to check the authenticity of the forged minutes. The defendant had been negligent in not checking the authenticity of the forged minutes which negligence has deprived the defendant from relying on the conclusive evidence clause. Accordingly judgment is entered for the plaintiff. (paras 27 & 42)

Case(s) referred to:

Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd & Anor [1983] 1 All ER 101 ***(refd)***

Alexander John Shek Kwok Bun v. Rich Avenue Sdn Bhd & Anor [2008] 7 CLJ 754 HC ***(refd)***

Chin Hooi Nan v. Comprehensive Auto Restoration Service Sdn Bhd & Anor [1995] 1 BLJ 25 HC ***(foll)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Chua Chye Leong Alan v. Grand Palace De-luxe Nite Club Pte Ltd [1993] 3 SLR 449 ***(refd)***

Karsales (Harrow) Ltd v. Wallis [1956] 1 WLR 936 ***(refd)***

Kua Lee Ngoh v. Jagindar Singh Speeding [1987] SLR 239 ***(refd)***

Pertamina Energy Trading Limited v. Credit Suisse [2006] SGCA 27 ***(not foll)***

Public Bank Bhd v. Anuar Hong & Ong [2005] 1 CLJ 289 HC ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] 1 AC 80 ***(foll)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 12(1)
Societies Act 1966, s. 9(c)

Other source(s) referred to:

Visu Sinardurai, *Law of Contract in Malaysia & Singapore: Cases & Commentary*, pp 201 & 202

For the plaintiff - Lim Heng Choo; M/s Lim & Lim Advocates
For the defendant - Chan Kay Heng; M/s Chan & Chan Advocates

Reported by Susheila Sreedharan

A

JUDGMENT

David Wong Dak Wah J:

Proceedings

B **[1]** The plaintiff claims for a sum of RM322,007.95, being an amount wrongly honoured by the defendant through 186 cheques signed solely by one Nazerah Hj Obeng (Obeng).

[2] The claim is disputed by the defendant on the ground that the plaintiff was solely to blame for the loss of RM322,007.95 due to its failure to comply with the terms and conditions attached to the operation of the current account.

Background Facts

D **[3]** The plaintiff was the Chairman of the Sarawak Housing Developer' Association (SHDA) for the period 2002 till 2004 and is suing the defendant on behalf of the association. By a letter dated 6 October 1992 SHDA applied to open a current account with the defendant bank at its branch at Wisma Satok, Jalan Satok, Kuching. Contained in that letter are the following documents:

E

1 Malayan Banking Application forms.

2 Copy of the Rules and Regulations/Constitution.

3 List of Current Board Members.

F

4 Resolution of the Committee.

[4] This application was handled by DW1 who confirmed that the terms and conditions as exhibited in pp. 174-175 of exh. B were attached to the application form. The page containing those terms and conditions was detached from the application form and given to the plaintiff on 6 October 1992 when he went to the defendant's office to hand over the just mentioned letter. Of relevance to this case are the following terms and conditions which read as follows:

G

H

> Clause 9.2: I/We agree to examine and notify the Bank of any errors, irregularities, discrepancies, claims or unauthorized debits or items whether made, processed or paid as a result of forgery, fraud, lack of authority, negligence or otherwise by any person whatsoever.

I

Clause 9.3: I/We further agree that if I/we fail to advise you in writing of the non-receipt of the statement and obtain the statement from you, or to notify you of any errors, discrepancies, claims or unauthorized debits or items in the statement within twenty-one (21) days from the date of the statement, the Bank's accounts or records shall be conclusive evidence of the transaction entries and balances in such accounts and I/We shall be deemed conclusively to have accepted all matters contained in the statement as true and correct in all aspects. (Conclusive evidence clause)

Clause 6.2: The conditions printed on the cover of the cheque book are to be strictly observed.

[5] The conditions contained in the cheque book are exhibited at p. 177 of exh. B which reads as follows:

Caution

The cheques in this book are for your exclusive use and should be issued on the account opened in your name. Please count the cheques before using. You are advised to observe the following "Dos" and "Don'ts" for your protection against forgery, fraud or other unauthorized alterations on cheques:

Do	Don't
1. Keep the cheques in a safe and locked place.	1. Leave the cheques whether signed or unsigned unattended.
2. Use only permanent ink pen or ball point pen to write cheques	2. Use laser printer, felt-tip pen, erasable pen or pencil or other non-impact printing techniques to write cheques.
3. Write the payee name, amount in words and figures left-justified without leaving any unused space.	3. Use correctable ribbon should a typewriter be used.
4. Include the word 'only' at the end of amount written in words.	4. Leave wide spaces for other words or figures to be added.
5. Rule through any unused space with a pair of parallel lines.	5. Allow anyone to take any blank cheques.
6. Sign in full on all cheques upon issuance.	6. Permit any unauthorized third party to keep possession of the cheque books.
7. Check periodically whether any unissued cheques have been removed from the cheque book without your knowledge.	7. Sign on blank cheques.

8. Conduct regular reconciliation of cheques paid against the bank statements.	8. Give cheques to strangers, even if they represent themselves as customers of the Bank.
9. Report to the Bank immediately if any cheque is found missing from the cheque book, lost or stolen, or if any discrepancy is discovered in the bank statement.	9. Exchange cheques for cash with unknown person.
10. Destroy all spoilt/cancelled cheques.	10. Make any alterations on cheque.
11. Use opaque or good quality envelopes to send cheques by mail so as to conceal the content.	11. Scan the cheques to facilitate cloning.
12. Inform the Bank immediately of any change in the signing mandate, particularly when the authorized signatories have left the company.	12. Use window envelopes or thin envelopes to send cheques by mail as this would reveal the content when being held against the light.

Important: Application for new cheque book should be made on the pre-printed application form enclosed in this cheque book.

You may be held accountable if you do not observe any of the precautionary measures or facilitate forgery, fraud or alterations on cheques, whether knowingly or negligently

[6] In the board members meeting dated 22 August 1992 approving the opening of the account, two resolutions were passed and they were as follows:

(a) The meeting Resolved to accept and set up an account with Malayan Banking Berhad with terms and conditions as stated by Malayan banking Berhad.

(b) That the aforesaid bank be authorized to pay cheques and other negotiable instruments signed by any TWO of the following four signatories:

Protem Chairman:	Alex Ting Kuang Kuo K694009
Protem Vice-Chairman:	Zainal Abidin B Ahmad K743095
Protem Hon-Secretary:	Richard Tan Yoke Seng K245597
Protem Hon-Treasurer:	Chong Chung Ping K154007

[7] The plaintiff's current account bears the number 0-11113-20591-2 (current account). In respect of the Rules and Regulations/ Constitution the relevant paragraph is para. 9.3 which states as follows:

> All cheques or withdrawal notices on the Association's account shall be **signed jointly by the Chairman (or in his absence the Vice-Chairman) and the Treasurer**. In the absence of the Treasurer the Assistant Treasurer shall sign in his place. (emphasis added)

[8] On 10 May 1993 the then protem secretary, Richard Tan Yoke Seng forwarded the same rules and regulations/constitution to the defendant. On 9 January 1998, the then treasurer forwarded the names of the new office bearers following the annual general meeting on 21 December 1997 to the defendant. In that letter, the treasurer also wrote:

> In accordance with our Constitution, the signatories of our account are specified under Article 23(4) and as such, we are pleased to enclose herewith the specimen signatures of the respective office bearers for the operation of our current account.

[9] Article 23(4) of the Constitution states as follows:

> All cheques or withdrawal notices on the Association's account shall be signed jointly by the Chairman (or in his absence the Vice-Chairman) and the Treasurer. In the absence of the Treasurer the Assistant Treasurer shall sign in his place.

[10] Subsequent to the annual general meeting on 30 March, 2002, Obeng on the same day wrote a letter to the defendant informing them of the newly elected office bearers and of significance also stated 'In accordance with our Constitution, the signatories of our account are specified under art. 23(4) and as such, we are pleased to enclose herewith the specimen signature of the respective office bearers for the operation of our current account.'

[11] Obeng was appointed as the executive secretary of SHDA sometime in 2001 and was tasked with the daily administrative duties of SHDA's office. She was also tasked with the recording of the minutes of the executive committee meetings. The cheque book of the current account was also kept by her.

[12] An executive committee meeting was held on 11 April 2002 (3rd executive committee meeting). Two versions of the minutes of that meeting were produced during trial. The first version is exhibited at pp. 27 - 30 of exh. A, while the second version is exhibited at pp. 34 - 37 of exh. B. There are two stark differences

in the two versions. In the first version the signatories were that of Rewi Hamid Bugo, as secretary and Alex Ting Kwang Kuo, as chairman while the second version the signatories were that of Obeng, as executive secretary and Alex Ting Kwang Kuo, as chairman. The other difference is item 8.2 of the minutes. The first version contained the following:

> Change of Cheque Signatories
>
> The Executive Secretary has prepared letter to the bank, pending signatories from Chairman, Treasurer, Secretary and Assistant Treasurer

[13] While the second version contained the following:

> Change of Cheque Signatories
>
> The Executive Secretary has prepared letter to the bank, pending signatories from Chairman and Treasurer. The meeting also resolved that due to the fact that the authorized signatories may not at all of the time in town to sign cheques for SHDA, it is resolved that the Executive Secretary will be one of the authorized signatories on behalf of the Association. The limit will up to RM2,000 only.

[14] It is the plaintiff's case that the first version of the minutes is the correct one and the second version was forged by Obeng to perpetrate her scheme to defraud SHDA.

[15] On 18 May 2002, a letter allegedly signed by the plaintiff was sent to the defendant informing as follows:

> We refer to our above current account with your bank and are pleased to attach herewith, additional authorized signatory for your kind information please. The previous instruction is still status quo, ie any amount of RM2,000.00 and below any one (1) of the 3 signatories is authorized to sign and any amount that exceed RM2,001 would require two (2) signatories.

[16] That additional signatory belonged to Obeng. It is the plaintiff's case that it was Obeng who wrote that letter using a scanned copy of the plaintiff's signature. The defendant accepted the instruction contained in that letter without verifying it with any of the executive members of SHDA or with the provisions in the constitution of SHDA.

[17] Relying on the defendant's acceptance of the instruction, Obeng issued and signed 186 cheques totalling RM322,007.95 from the current account from May 2002 to April 2003.

[18] The acts of Obeng was not discovered until the end of April 2003 when SHDA's auditor pointed out to the committee that there were some irregularities in the current account. Upon being informed the plaintiff and the then treasurer went to the defendant's office and informed DW4, the then branch manager of the defendant. A police report was lodged against Obeng.

Plaintiff's Case

[19] Their contention is pretty straightforward. SHDA never authorized their executive secretary, Obeng, as one of the signatories for the current account. The 2nd version of the executive committee meeting minutes and the letter dated 18 May 2002 allegedly signed by the plaintiff were forged documents done by Obeng and used to perpetrate her scheme to defraud the plaintiff. Based on that circumstance, SHDA contended that the defendant had breached its duty of care in failing to check with the officer bearers and the constitution of SHDA the truth of the contents of the letter dated 18 May 2002. Because of this failure, it was submitted that the defendant had committed the tort of conversion.

Defendant's Case

[20] Apart from requiring the plaintiff to prove that Obeng's authority to sign cheques for the current account is improper and not mandated by the executive committee of SHDA, its case is premised on the contention that SHDA had breached the terms and conditions attached to the operation of the current account and as such is disentitled to claim for the refund of the sum of RM322,007.95 or alternatively SHDA had contributed to the loss by their own negligence.

Findings Of The Court On The Issues Arising From The Case

Issue No. 1: Capacity To Sue

[21] From the outset of his submission, counsel for the defendant, Mr. Chan Kay Heng contended that the suit should be struck out on the ground that the plaintiff lack capacity or *locus standi* to institute this action. He relied on s. 9(c) of the Societies Act 1966 which states as follows:

> A society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society?.

[22] In Mr. Chan's view, s. 9(c) mandatorily requires the suit to be issued in the name of the registered public officer or if there is no registered public officer, the suit must be issued in the name of its officer bearers. Furthermore there was non compliance of O. 15 r. 12(1) RHC in that it did not state that the plaintiff is suing in a representative capacity. He also referred to the Court of Appeal case of *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363. I have read this case with care and I cannot see how it helped the counsel's submission. James Foong JCA after reviewing the relevant cases concluded as follows at p. 382:

> From these authorities, it is clear that the approach should be these: Firstly for certain, an association cannot sue in its own name. Preferably an action should be commenced by its registered public officer. If none is registered as such, then it is permissible for any office bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding which is permitted under O. 15 r. 12(1) of the RHC

[23] Applying the above principle to the present case, I cannot see how the plaintiff had not complied with the law. From the evidence the plaintiff had testified in no uncertain terms that he was the chairman of SHDA and looking at the title of the writ in a reasonable manner, one can only conclude that the plaintiff is suing in a representative capacity.

[24] In any event, the defendant knew from day one that it was SHDA who is seeking recovery of the sum RM322,007.95. They could not have been misled in any way as to the identity of the plaintiff. Furthermore the defendant had filed unconditional appearance, defence, amended defence and re-amended defence. And it was only in its re-amended defence (some two years after the suit was filed) that the issue of *locus standi* was raised. In my view the defendant should have taken an application to strike out the action soon after appearance. To leave it to such a late stage is nothing but a ploy of cloak and dagger advocacy which cannot be condoned by the court. Counsels must realize that in a civil trial, full disclosure of his intended action must be given to the opposing counsel at the earliest opportunity.

[25] For reasons given, I dismiss the contention of the plaintiff's lack of capacity to sue.

Issue No. 2: Whether The Plaintiff Had Proved Obeng's Authority To Issue And Sign Cheques Was Invalid In That Such Authority Had Not Been Approved By The Executive Committee Of SHDA?

[26] This issue requires the court to make a finding of fact as to whether the 2nd version of the minutes of the 3rd executive committee meeting was a fake document created by Obeng. The burden of proof naturally rests on the plaintiff and the standard of proof is one of balance of probability.

[27] SHDA called the plaintiff as their only witness. Having heard his evidence and given due consideration to the documents produced, I am satisfied that the plaintiff had on a balance of probability proved that Obeng had forged the 2nd version of the minutes of the 3rd executive committee meeting (forged minutes) and my reasons are these:

1. The fact that there is in existence two versions of the minutes of the 3rd executive committee meeting can only mean that one version is a fake document.

2. There is no reason for anyone in the SHDA executive committee to create another version of the minutes of the 3rd executive committee meeting.

3. The fact that the 2nd version was given to the defendant together with the specimen signature of Obeng give rise to a reasonable inference that it was Obeng who forged the 2nd version as she had benefited by it in that she could and did issue and sign 186 cheques of SHDA with a face value of up to RM2,000 per cheque.

4. The fact that between 23 May 2002 and 25 April 2003, Obeng had signed 186 cheques made payable to 'cash' or other third parties for amount of RM2,000 or below corroborate the plaintiff's testimony that the 2nd version was a forgery.

5. The fact that since the opening of the current account with the defendant only office bearers of the SHDA had the right to sign cheques for the current account proves that the 2nd version cannot be correct.

6. It is not reasonable for an association like SHDA to allow a non member or non office bearers to sign cheques for the current account.

A 7. The contents of the letter dated 18 May 2002 addressed to the defendant contravened the constitution's provisions (para. 9.3 or art. 23(4)) and it is reasonable to infer that the plaintiff, as the chairman, would not write such a letter. Furthermore it does not make business sense to allow a person who was on a
B three months probationary period in respect of her job performance to operate the current account.

8. The testimony of the plaintiff that the minutes of executive committee meetings are usually signed by the chairman and the secretary in my view is credible in that the secretary as opposed
C to the executive secretary is a member of the association. It makes no sense for Obeng who was not a member of the association and was recording the minutes to confirm it. To allow her to do so would provide no check as to whether or not the records of the meetings were correct.

D

9. Finally the failure on the part of defendant to call Obeng as its witness to rebut the plaintiff's claim as to the nature of the 2nd version of the minutes of the 3rd executive committee meeting, in my view, corroborate the contention that the
E minutes was forged by Obeng. It is not reasonable for the plaintiff to call Obeng as their witness as she would be considered as a hostile witness. On the other hand, it would be in the defendant's interest to call Obeng as its witness and there is no reason why she would not volunteer to testify as she too has been sued by the plaintiff for the recovery of the
F RM322,007.95 in another suit.

[28] With that I now move to the next issue.

Issue No. 3: Whether The Defendant Had Committed The Tort Of Conversion By Honouring The 186 Cheques Amounting To RM322,007.95 Issued And Signed By Obeng?

G

The Law

[29] The submission of Mr. Lim Heng Choo, counsel for the
H plaintiff is pretty straightforward. The defendant had no mandate to make payments on the 186 cheques for the simple reason that Obeng was not an authorized signatory to the current account. Hence the defendant is liable to compensate the plaintiff for the amount wrongfully debited. The case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 SC was cited
I as authority for the submission. The facts in that case are these. The appellant carried on banking business while the respondent was a customer of the appellant. Two of the respondent's directors were

the authorized signatories to operate the current account. The respondent's account clerk forged several cheques of the current account and they were honoured by the appellant. The fraud was discovered after a new account clerk was employed. Upon discovery of the forgery police reports were made and legal action was taken against the appellant for the recovery of RM397,660 being the total amount of the forged cheques. The Supreme Court through the judgment of Annuar J upheld the judgment of the High Court decided as follows:

> It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability. ...
>
> At common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker ...
>
> A consideration of the relevant authorities shows that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan* [1918] AC 777 ("the MacMillan duty"). The second was laid down by the decision in *Greenwood v. Martins Bank Ltd.* [1933] AC 51 ('the Greenwood duty') ...
>
> After a careful examination of the decisions of the superior Courts of the Commonwealth, we are satisfied that there does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

[30] The forgery perpetrated by Obeng was only made known to the SHDA by its auditor in May 2003 and upon its discovery PW1 and the Treasurer immediately informed the defendant through DW4.

[31] Rebutting Mr. Lim's submission, Mr. Chan relied on the Singapore case of *Pertamina Energy Trading Limited v. Credit Suisse* [2006] SGCA 27 which had a conclusive clause similar to the present case which reads as follows:

> 1.3 The customer hereby agrees:
>
> (b) To examine all statements of account, bank statements, printed forms, deposit slips, credit advice notes, transaction advices and other documents (hereinafter in this Clause referred to collectively as "statements") supplied by the Bank setting out transactions on any of the Accounts and agrees that unless the Customer objects in writing to any of the matters contained in such statement within 14 days of the date of such statement, the Customer shall be deemed conclusively to have accepted all the matters contained in such statement as true and accurate in all respects..

[32] The Singapore Court of Appeal through the judgment of VK Rajah J construed the clause as follows:

> The clause imposes two concurrent duties on a customer. First, the customer is obliged to examine all statements issued by the bank setting out the transactions involving the accounts it has with the bank. The customer is to check whether all debits or credits to its accounts as reflected in the statements are accurate and have been properly authorized. The customer should also compare the bank statements against its financial records in order to ascertain if there are any discrepancies. Secondly, should any inaccuracies or discrepancies appear in the bank statements, or the slightest suspicion that sums have been debited without proper authorization prevail, it is incumbent on the customer to write to the bank within 14 days from the date of the bank statements to dispute their contents. If the customer fails to do so, the bank is legally entitled (though not compelled) to treat the bank statements as conclusive evidence of "all matters" contained in the statements. This includes, *inter alia*, the particulars of any transactions stated therein, the amounts debited and credited, the balance indicated and/or any indication in the statement that the account is subject to some form of security or charge or lien.
>
> As such, we are satisfied that the ambit of the phrase 'unless the Customer objects in writing to any the matters in such statement ... the customer shall be deemed conclusively to have accepted all the matters contained in such statement' is wide enough to exonerate the Respondent from the consequences of a fraud perpetrated on the appellant, if the latter fails to notify it of the relevant discrepancy within the stipulated period from the date of the relevant bank statements.

[33] The decision of the Singapore Court of Appeal appeared to have departed from the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80 where it held that the customer of the bank did not owe a duty to the bank to prevent forgery of his signature. It further held that there is no duty on the customer to check his bank statements. Lord Scarman rationalizes the decision in the following manner:

> The business of banking is the business not of the customer but of bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer.

[34] Another case which did not follow the Privy Council is the local case of *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 where the facts were these. The plaintiff had two accounts with the defendant bank. Forged cheques were drawn from the two current accounts and they were honoured by the defendant. The cheques were forged by the accounts clerk of the plaintiff who took legal action against the defendant in the magistrate court to recover the debited amount on the ground that the defendant had no right to debit the current accounts as the cheques were forged. The magistrate entered judgment for the plaintiff resulting in an appeal to the High Court where Zaleha Zahari J (as she then was) dealt with the issue whether the plaintiff had a duty not to facilitate fraud. This is what she said:

> Whether or not the respondent were themselves in breach of their duty of care owed to the appellant in contract or in tort, is a question of fact having regard to all of the circumstances of the case.
>
> The relationship between a bank and an account holder carries with it the obligation on the part of the bank to honour the customer's mandate as regards payment from the customer's account. The bank owes a duty of care to the customer to withhold payment where there has been fraudulent conduct. The customer clearly also owes a duty not to facilitate fraud. In the absence of express terms to the contrary the customer's duty in relation to forged cheques is limited to exercising due care in drawing cheque so as not to facilitate fraud or forgery.
>
> I am of the considered opinion that on the facts of the present case the respondent, as employer, appeared to have been rather lax in exercising its supervision in respect of its financial affairs. In my considered opinion to supervise their financial clerk SP3 only once in

three months after the initial period was inadequate. The respondent had clearly failed to exercise due care in protecting their own interest from any misconduct of their own employees.

The customer clearly has a contractual duty to notify the bank of any unauthorized cheques of which they became aware.

The appellant's counsel had laid stress on the respondent's failure to comply with the express provisions of the agreement governing the operation of the bank accounts between the parties. (exh. "D 43(A)"). Clause 3.1 requires the respondent to keep their cheque books in safe custody whilst cl. 18 (p. 64 Appeal Record) requires the respondent to scrutinize the accounts. It was submitted that had the respondent scrutinized their banking statements as envisaged by this clause the true character of the cheques in issue would have surfaced and the loss averted or minimized.

I am in agreement with the appellant's counsel's submission that where there is an express provision for a customer to verify its accuracy within a specified period, it is incumbent upon a customer to check their bank records and statement and draw the bank's attention to any errors or discrepancy; the ordinary case of arithmetical errors, failure to credit sums to their account, of wrongful albeit innocent debit to an account.

It is a waste of paper and effect if the only obligation of a customer, so to speak, is simply to file such accounts away without taking the trouble to read them and check their accuracy.

The Bank cannot reasonably be required with their own legitimate commercial pressure and concerns to attend to, be more vigilant in the respondent's interest than the respondent himself. A bank is dealing with hundreds or thousands of customers who have their own practices and habits. Bank officers come and go or go on leave and it is extremely onerous to impose on every officer a duty to communicate with every customer before they *bona fide* honour a cheque in the sums represented by the cheques in issue in this case. Notification of any error must be seen as being not only for the protection of the bank, but also for the protection of the customer.

By reason of the respondent's failure to notify the bank in writing within the time prescribed of 14 days pursuant to cl. 18, the respondent is accordingly deemed to have accepted such entries made up to the date of last entry, in the statement as "correct, binding, final and conclusive and thereby adopts all cheques drawn thereon".

In this situation I am in agreement with the submission of the appellant's counsel that the respondent is to be estopped from relying on the forgery committed by their own employee and that they are deemed to have ratified the same.

[35] Reverting to the case at hand, the task which confronts me is to decide which school of thoughts I should adopt. In discharging this task, I start off by restating the basic premise of the relationship between a bank and customer. Fundamental to this contractual relationship is that the bank is only mandated to debit the account of the customer when that instruction is validly given in the form of a signature. When that instruction or signature is forged, the bank has no authority to act on the mandate. In my opinion any attempt to water down that fundamental term of the relationship by way of inclusion of a conclusive evidence clause amounts to an attempt to introduce an exemption clause which would exclude liability for a fundamental breach. Hence to determine whether the conclusive evidence clause (see cl. 9.3 set out above) is effective in the factual matrix of this case, I must now look at the general principle of law applying to exemption clauses excluding a fundamental breach as opposed to clauses limiting liability. This distinction was made by the House of Lords in *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd & Anor* [1983] 1 All ER 101. This is what Lord Fraser said:

> There are later authorities which lay down very strict principles to be applied when considering the effect of clauses of exclusion or of indemnity: see particularly the Privy Council case of *Canada Steamship Lines Ltd v. R* [1952] 1 All ER 305 at 310, where Lord Morton, delivering the advice of the Board, summarized the principles in terms which have recently been applied by this House in *Smith v. UMB Chrysler (Scotland) Ltd* [1978] SC (HL) 1. In my opinion these principles are not applicable in their full rigour when considering the effect of conditions merely limiting liability. Such conditions will of course be read contra proferentem and must be clearly expressed, but there is no reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses

[36] I had an opportunity in the case of *Alexander John Shek Kwok Bun v. Rich Avenue Sdn Bhd & Anor* [2008] 7 CLJ 754 to deal with an exemption clause excluding fundamental breach. In that case I referred and applied the principle of law stated by Lord Denning in *Karsales (Harrow) Ltd v. Wallis* [1956] 1 WLR 936:

> Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct of indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract.

[37] As stated by me earlier, the exclusion clause is in fact a clause excluding a fundamental breach which on the authority of the case of *Karsales (supra)* cannot be relied on by the defendant in this case. Accordingly I find that the conclusive clause and the other conditions connected to it have no legal effect on the plaintiff.

[38] Even if I am wrong in my just stated conclusion, the defendant would have difficulty in overcoming the decision of Privy Council in *Tai Hing*. The facts there were these. The plaintiffs had three different bank accounts with three banks and over a period of several years, their clerk misappropriated a sum of HK$5.5 million from the three accounts by forging the cheques of the managing director of the plaintiffs. The plaintiffs took legal action against the three banks for wrongfully debiting their accounts. The three banks relied on a contractual term which required the plaintiffs to examine the bank statements and inform of any discrepancy and contended that the plaintiffs were prohibited from asserting that the cheques were forged. The contractual terms were as follows:

> Chekiang First Bank agreement provides as follows:
>
> > A monthly statement for each account will be sent by the bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the bank in writing of any error therein within ten days after sending of such statement.
>
> The Bank of Tokyo agreement provides as follows:
>
> > The bank's statement of my/our account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight, the bank may take the statement as approved by me/us.
>
> The Liu Chong Hing Bank agreement provides as follow:
>
> A statement of the customer's account will be rendered once a month. Customers are desired: (1) to examine all entries in the statement of account and to report at once to the bank any error found therein. (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed.

[39] The Privy Council rejected the three banks' reliance on those clauses and the reasons are as stated by Lord Scarman:

> If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements in the absence of query, unchallengeable by the customer after expiry of a

> time limit, the burden of the obligation and of the sanction imposed must be brought home to the customer. In their Lordship's view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement

[40] What that entails is that the words in the agreement must be so clear and unambiguous that the customer would know the conclusive effect of the statements if no query is raised. It could be argued that the conclusive evidence clause in the present case is clear and wide enough to cover forgery by anyone as it states that the plaintiff "shall be deemed conclusively to have accepted **all matters** contained in the statement as true and correct in all aspects." (Emphasis added). Reading the words in their natural meaning, it would be difficult for me to disagree with that argument. However I would add that the phrase of Lord Scarman "brought home to the customer" should include bringing notice to the plaintiff of the existence of the conclusive evidence clause in the context of this case which is this. The relationship between the plaintiff and the defendant in this case was not formalized by way of a written and signed agreement where terms and conditions were negotiated. In the words of DW1 (the defendant's officer which opened the account), the terms and conditions for opening the cheque account were "imposed" on the plaintiff. These terms and conditions were in a printed perforated form which was attached to the application form and handed over to the plaintiff. They can be equated to standard form contracts which have practically become the norm in most commercial transaction. I find support for my conclusion in local cases as well as other jurisdictions. The learned author Visu Sinardurai in *Law of Contract in Malaysia & Singapore: Cases & Commentary* at pp. 201 and 202 lists out the relevant cases which are the unreported Malaysian case of *Ghee Seng Motor v. Ling Sie Ting*, the Singapore cases of *Kua Lee Ngoh v. Jagindar Singh Speeding* [1987] SLR 239 (followed in *Chua Chye Leong Alan v. Grand Palace De-luxe Nite Club Pte Ltd* [1993] 3 SLR 449). In the Malaysian case, the defendant agreed to ship the plaintiff's car from Kuching to Limbang. The defendant's vessel sank in the journey resulting in the total loss of the car. The plaintiff sued the defendant who relied on the exemption clause contained in the freight advice bill. The court found that since there was no evidence that notice was given to the plaintiff on the exemption clause the defendant was prevented from relying on it. In the Singapore case the plaintiff had sent a car for servicing with the defendant. The car was lost during the period it was in the possession of the defendant. The plaintiff sued the defendant who

relied on an exemption clause put up in a notice which had been placed on the defendant's premises. Again the Singapore High Court held that the defendant could not rely on the exemption clause as no notice had been given.

[41] Can it be said then that SHDA here had notice of the conclusive evidence clause? There is no dispute that there was a board meeting approving the opening of the current account and acknowledging the terms and conditions attached to the operation of the current account. The relevant evidence is from DW1 who testified that he had handed over the terms and condition to the officer bearers of the SHDA. I have no doubt that he had. But is that enough? It is not insignificant that SHDA had not engaged a legal adviser to explain to them the legal effect of the conclusive evidence clause. Nor was it insignificant that SHDA had not been advised by the defendant to seek legal advice on the terms and conditions. In my opinion, the opening of bank account with a bank is no different from executing a charge document to a bank where in such a case the customer is required by the bank to seek independent legal advice on the legal effect of the charge documents. The legal effect of the terms and conditions attached to the opening of the account is far reaching. In the context of this case, the defendant is saying to the plaintiff that it is not liable as the conclusive evidence clause excludes its fundamental obligation of debiting the account only when the mandate is validly given. If that is what the defendant wants the plaintiff to know then it must make sure that it is advised accordingly. This failure, in my opinion, militates against the defendant as far as the notice issue is concerned. The least the defendant ought to have done is to advice the Board of SHDA to seek legal advice on the terms and conditions attached to the opening of the cheque account or alternatively inform the defendant the legal effect of the conclusive evidence clause and the other related clauses especially the effect of failing to challenge the monthly statements. Unless what I have said has been done by the defendant, the plaintiff and his fellow officer bearers could not make an "informed" decision whether to open a cheque account with the defendant. It is not insignificant that the defendant itself was not aware of the terms and conditions which it is now relying as only after two years and four months did its solicitor apply to amend its defence to include the terms and conditions. Accordingly I find that the defendant is prevented from relying on the conclusive evidence clause.

[42] In any event, the defendant is prohibited from relying on the conclusive evidence clause as they had been negligent in accepting the signature of Obeng as an authorized signatory. SHDA is an association registered under the Society Act and for it to open and

operate a bank account; it must do so in accordance with its constitution. It is undisputed that the SHDA's provisional constitution was given to the defendant when the bank account was opened. In art. 9.3, it specifically states that "all cheques or withdrawal notices on the Association's account shall be signed jointly by the Chairman (or in his absence the Vice Chairman) and the Treasurer. In the absence of the Treasurer the Assistant Treasurer shall be signed in his place". There is some dispute as to whether the approved Constitution of SHDA was given to the defendant. Having heard the evidence of PW1 and DW2, I find that it is not credible that the approved Constitution of SHDA was not given to the defendant. In fact if it was not, the defendant would be negligent in not asking for the approved Constitution as it is the defendant's primary duty to ensure that they are fully aware of the authorized signatories to the bank account. In any event it is of no significance whether the defendant had received the approved constitution as the relevant clause (art. 23(4)) there is similar to art. 9.3 of the provisional Constitution which the defendant had admitted to its existence. When the defendant received the forged minutes, its staff should have been alert to check whether Obeng's authority to sign cheques complied with art. 9.3 of the provisional Constitution or art. 23(4) of the approved Constitution. It is not denied by the defendant that it had not checked on the authenticity of the forged minutes. It is really a 'no brainer' to say that the defendant at that point in time had a duty of care to check the authenticity of the forged minutes. It is also a 'no brainer' to say that the defendant had been negligent in not checking the authenticity of the forged minutes, which negligence has deprived the defendant from relying on the conclusive evidence clause. For authority I rely on the judgment of Siti Norma Yaakob J (as she then was) in *Chin Hooi Nan v. Comprehensive Auto Restoration Service Sdn Bhd & Anor* [1995] 1 BLJ 25 HC. The facts are these. The appellant had parked his car at the respondent's premises for the purpose of having the car waxed and polished. The car was damaged when it was in the custody of the respondent. The appellant sued the respondent for negligence. The respondent relied on an exemption clause printed at the back of the receipt given to the appellant. The exemption clause states that "the company is not liable for any loss or damage whatsoever of or to the vehicle, its accessories or contents. Vehicles and goods are at owner's risk". Her Ladyship found as follows:

> Before me the issue is whether such an exemption clause can absolve the Respondents from any blame for damages caused to the car. The law on this is quite settled in that an exemption clause however wide and general does not exonerate the Respondents from the burden of proving that the damages caused to the car were not due to their

A negligence and misconduct. They must show that they had exercised due diligence and care in the handling of the car. *Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd* [1959] MLJ 200, and *Port Sweettenham Authority v. TW Wu & Co (M) Sdn Bhd* [1978] 2 MLJ 137, are authorities for this proposition of the law

B **[43]** Before I give the orders it should be noted that Obeng had conceived quite a sophisticated scheme to defraud her employer. Not only did she forge the minutes in a manner which deceived the defendant, she also presented faked monthly bank statements to the committee which had no cause to doubt her integrity. It is
C unreasonable for the committee to employ another full time person to watch over its executive secretary. In any event SHDA had employed an internal auditor who had discovered the fraud in May 2003 which is a year after the perpetration of the fraud.

D **[44]** For reasons stated above I give judgment to the plaintiff on the following terms:

1. The sum of RM322,007.95,

2. Interests at the rate of 4% on the judgment sum of
E RM322,007.95 from the date of demand (3 November 2003) to the date of this judgment,

3. Interests at the statutory rate of 8% on the judgment sum from the date of judgment to full payment of the same, and

F 4. Costs to be taxed unless agreed to the plaintiff.

G

H

I